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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1029

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,

Petitioner,

against

R & M KAUFMANN, a Division of Russ Togs, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, District 65, Distributive Workers of America,* prays that a Writ of Certiorari issue to review the opinions of the United States Court of Appeals for the Seventh Circuit (1) on September 21, 1972, granting the Respondent's petition for review of a National Labor Relations Board order and (2) on October 27, 1972, denying Petitioner's motion for leave to intervene and for leave to file its petition for rehearing.

* Petitioner is the successor to the Union below, then known as District 65, Wholesale, Retail, Office and Processing Union.

Opinions Below

The original opinion of the United States Court of Appeals for the Seventh Circuit is reported at —— F.2d —— and is printed in the Appendix at page 1a. The order denying the petitioner's motion to intervene and petition for rehearing is unreported and is printed in the Appendix at page 8a.

The case originally came to the Court of Appeals on a Petition for Review and a Cross Application for Enforcement of an Order of the National Labor Relations Board. The Decision and Order of the Board is reported at 192 NLRB No. 14 and is printed in the Appendix at page 9a.

The motion by Petitioner for leave to intervene and its petition for rehearing are printed in the Appendix at pages 21a and 24a.

Jurisdiction

The judgment of the Court of Appeals granting the respondent's Petition for Review is dated September 21, 1972 and was entered on that date.

The order denying petitioner's Motion to Intervene and its Petition for Rehearing was entered on October 27, 1972. This petition for certiorari is filed within ninety (90) days of this date.

Jurisdiction to review, by Writ of Certiorari, the judgment of the Court of Appeals is conferred upon this Court by the provisions of 28 U.S.C. 1254(1) and by §10(e) and §10(f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f).

Questions Presented

I. When the National Labor Relations Board upholds a union's unfair labor practice charge against an employer and, following proceedings before the Board in which the union participated as a party, issues an order directed at the employer requiring it to bargain with the union, does the union have the right to intervene in judicial review proceedings brought by the employer, pursuant to this Court's decision in *UAW* v. *Fafnir Bearing*, 382 U.S. 205, after the Court of Appeals has granted the employer's petition to set aside said order of the Board?

II. When a United States Court of Appeals applies an improper standard of judicial review and substitutes its judgment for that of the National Labor Relations Board, thereby depriving the petitioner of substantial statutory and constitutional rights, should that decision be permitted to stand?

Statutes Involved

Provisions of United States statutes pertinent to this case are as follows:

29 U.S.C. 157. Employees shall have the right * * * to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining * * *

29 U.S.C. 158(a)(5). It shall be an unfair labor practice for an employer * * *

(5) to refuse to bargain collectively with te representatives of his employees, subject to the provisions of section 159(a) of this Title.

29 U.S.C. 159(a). Representatives designated or selected for the purpose of collective bargaining by the majority of employees * * * shall be the exclusive representatives * * * for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

29 U.S.C. 160(e). The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

29 U.S.C. 160(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (3) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, the findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

28 U.S.C. 1254(1). 1. Cases in the courts of appeals may be reviewed by the Supreme Court * * *:

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(1) By writ of certiorari granted upon the petition of any party of any civil case, before or after rendition of judgment or decree.

Statement of the Case

On May 26, 1969, the petitioner Union filed a petition with the National Labor Relations Board seeking an election for representation of a unit of traveling, commission salesmen employed by the respondent Employer. The Employer is engaged in the manufacture and sale of ladies' apparel, with its principal offices and plant located in Aurora, Illinois.

Hearings were held by the Regional Director for the 13th Region of the NLRB in Chicago, Illinois. All parties, including the petitioner were represented at and participated in the hearings, introducing evidence, examining and cross-examining witnesses and presented written and oral arguments.

The respondent, during the hearing, declined to enter into the usual stipulation that the Union was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The *sole* reason why the Employer declined to do so in that proceeding was predicated on its belief that the Union was not acting for itself (by bringing the representation proceeding) but in fact was "fronting" for another organization which had been disqualified by the Board from acting as a bargaining agent under the National Labor Relations Act.

The other organization is the National Association of Women's and Children's Apparel Salesmen (NAWCAS).

In a prior case before the Board, District 65 (the petitioner herein) and NAWCAS attempted to file joint petitions for representation in thirty-one (31) cases before the Board. The cases were consolidated and tried on the issue of whether NAWCAS was a labor organization within the meaning of the National Labor Relations Act.

The Board decided in that case, *Bambury Fashions*, 179 NLRB 447, that NAWCAS was a labor organization within the meaning of the Act but that *it* was disqualified because its conflicting interests in the operation of trade shows placed them in competition with employers whose employees they might seek to represent. 179 NLRB at 450.

Prior to the Board's decision in *Bambury*, District 65 *alone* filed the petition for representation on behalf of the traveling salesmen employed by R & M Kaufmann, a division of Russ Togs, Inc., and which resulted in the aforesaid representation hearings before the Board.

The Union argued before the Board (in this case below) that despite its affiliation with NAWCAS, it always continued to exist as a separate labor organization, having its own constitution, officers and organizational structure; that it continuously engaged separately in the representation of employees for collective bargaining and that it *alone* was entitled to be the bargaining representative of the employees involved in the proceeding.

On December 10, 1970, the Board issued its Decision and Direction of Election upholding District 65's contentions. 187 NLRB No. 20. Appendix at page 33a. In directing an

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election among the traveling salesmen (as petitioned for) the Board noted:

> We have carefully reviewed the entire record and also have taken official notice of our own proceedings, which show that over a period of years District 65 has appeared and been recognized as a labor organization in proceedings before this Board, including such an appearance as recently as 1970, quite independently of NAWCAS. We find that Petitioner is an existing separate labor organization and conclude that it is Petitioner's willingness itself to function as a bargaining agent which is the controlling factor in these circumstances. We shall therefore direct an election upon District 65's petition. However, if Petitioner is certified and refuses to maintain an independent course in representing unit employees, or if in bargaining the Employer has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine Petitioner's conduct when the Board's established procedures are appropriately invoked for such purpose. Appendix at pages 35a, 36a.

Pursuant to the Board's direction, a secret ballot election was held and, a majority of the employees in the unit voted for the union. Accordingly, the Board issued its Certification of Representation to District 65 on January 26, 1971.

Following its certification, District 65 made a demand upon the Employer to bargain with it which the company refused. On March 11, 1971, District 65 filed an unfair labor practice charge with the Board and, on April 1, 1971, the Board's Regional Director issued a complaint alleging

that the company's refusal to bargain with District 65 violated Section 8(a)(5) of the National Labor Relations Act.

In its answer to the complaint, the company admitted its refusal to bargain, but contended that the Board's decision in the underlying representation case—that District 65 was a labor organization and was not disqualified from acting as a collective bargaining agent—was erroneous.

Counsel for the General Counsel promptly moved for summary judgment. On July 9, 1971, the Board rendered its Decision and Order finding a violation of Section 8(a)(5) of the Act and granted the motion. It directed the company to bargain with District 65 and to cease and desist from interfering with the exercise of its employees' rights under Section 7 of the Act. Appendix at page 9a.

Thereafter the company filed its Petition to Review and set aside the Order of the Board in the Court of Appeals for the Seventh Circuit, pursuant to Section 10(f) of the Act. The petition named *only* the Board as Respondent. Appendix at page 7a.

The Board then cross-petitioned for enforcement of its Order. Appendix at page 43a. The Union did not seek intervention, at that time, in the enforcement and review proceedings because its private rights were being completely protected by the Board's petition and would have merely duplicated the Board's effort.

On September 21, 1972, the Seventh Circuit rendered a *per curiam* decision, granting the company's petition to

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review, setting aside the Board's order and denied enforcement of the Board's order. Appendix at page 1a. The Court held, *inter alia*, that:

> • • • the continued close relationship (of NAWCAS and District 65) *in and of itself* creates the danger that District 65 "*may bargain*, not for the benefit of unit employees, but for the protection and enhancement of NAWCAS. We conclude that the same conflict of interest which disqualified NAWCAS in *Bambury* also disqualifies District 65, which owes loyalties both to NAWCAS and to the employees in the bargaining unit. Slip op. page 5, Appendix at page 6a. [Emphasis added]

After conferring with representatives of the General Counsel of the National Labor Relations Board, counsel for the petitioner herein was adviced that the Board would neither petition the Court for rehearing nor petition for certiorari, principally because there were no substantial public rights at stake.

Having no other alternative in order to protect its rights the petitioner Union then moved to intervene before the Seventh Circuit with leave to file its petition for rehearing. Appendix at pages 21a and 24a. The motion to intervene set forth the following grounds for intervention:

(1) At this point in the litigation the Union's interest in the case can be represented *only* by the Union. It was the Union's contract, the Union's bargaining status and the Union's members that are jeopardized by the Employer's refusal to bargain in good faith. It was noted that a compelling reason for intervention was the standing the Union would thereby acquire to seek certiorari from the adverse

Court decision, particularly since the Board has declined to seek certiorari. Appendix at pages 22a, 23a.

(2) The Union has been the real party in interest at all times with substantial legal and equitable claims at stake. The Board has been a nominal party. Appendix at page 22a.

The petition for rehearing set forth the following as reasons why it should have been granted:

(1) The Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion. Appendix at page 25a.

(2) The Board's judgment that District 65's relationship with NAWCAS does *not* present a clear and present danger to the interests of the employees on whose behalf it seeks bargaining rights should not be disturbed unless such a finding is arbitrary and capricious. Appendix at page 26a.

(3) The Court's reliance on the "formal affiliation agreement" between NAWCAS and District 65 was misplaced. NAWCAS officers *do not* control District 65; NAWCAS *does not* retain the ultimate authority to make decisions in collective bargaining, as erroneously decided by the Court. Appendix at pages 28a, 29a.

(4) The record in this case is *absolutely* clear that only District 65 has responsibility for collective bargaining on behalf of its members, irrespective of what other associa-

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tions the members might belong to. Under no circumstances could NAWCAS veto any decision made by District 65 and the salesmen it represents. Appendix at page 29a.

(5) The Court's reliance on the *Bambury* case was also misplaced. In *Bambury,* only NAWCAS was disqualified, not District 65. To disqualify District 65 because of its association with NAWCAS is tantamount to a prior restraint on the rights of the salesmen-members of District 65. Appendix at page 31a.

(6) The Court's decision, if permitted to stand, will destroy District 65's right to organize wholesale apparel salesmen because the Union would forever carry the "taint" of NAWCAS with it. Appendix at pages 31a, 32a.

The company filed a memorandum in opposition to the motion to intervene and the petition for a rehearing. Appendix at page 46a. Basically, the company's position was that the Union waived its right to intervene because it chose not to intervene when the matter "was first presented to the Court." Appendix at page 47a. The Board did not oppose the motion to intervene or the petition for rehearing.

On October 27, 1972 the Seventh Circuit rendered its order denying both the motion to intervene and the petition for rehearing. Appendix at page 8a. That order, and the earlier *per curiam* decision of the Court setting aside the Board's order, is now under review by this Court.

Reasons for Granting the Writ

The Court should grant certiorari in this case because:

(1) The Seventh Circuit's decision denying intervention after the Court had set aside the Board's order conflicts with this Court's decision in *UAW* v. *Fafnir Bearing, supra.* Once the Board abandoned the case and decided not "to represent the Union" any longer, the Union became entitled, as "the real party of interest," to seek review of the Court of Appeals decision.

(2) The Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion. Its decision in setting aside an order of the National Labor Relations Board is in conflict with decisions of this Court, as well as other decisions in the Seventh Circuit.

The Court should have permitted the Union to intervene after it set aside the Board's order. Once the Board decided not to pursue the matter the Union's right to intervene became timely.

This Court, in *UAW* v. *Fafnir Bearing, supra,* construed 28 U.S.C. 1254(1) to mean that a union is a "party" within the meaning of that section for purposes of appellate review after the NLRB renders a decision and order in that union's favor. Prior to *Fafnir,* 28 U.S.C. 1254(1) was interpreted by several Circuit Courts as *not* conferring that right.

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28 U.S.C. 1254(1) again comes into question in the instant case. Since *Fafnir,* the language of the section has remained the same; the *right* to intervene in appellate court proceedings of this nature is conferred strictly by case law and not by clear legislative language. Thus, the time limitations for review, contained in §10(f) of the National Labor Relations Act, which was not designed for a charging party's intervention, is still invoked against the charging party when it attempts to exercise its *judicially* granted right of intervention.

It is manifest that the refusal to permit the union to intervene after the Labor Board has abandoned its pursuit of the protection of public rights is grossly unfair. There are very real private rights at stake in this case that deserve review by this Court. Basically, the right involved is that recognized in Section 7 of the National Labor Relations Act, the right to bargain collectively with an employer. While it may be said that the Union's statutory right initially became impressed with public policy considerations, enabling the Board to recognize and enforce it, that right or interest remained as an object of parochial union concern. The Union's interest has both public and private connotations; the latter requires intervention in the appellate court proceedings, especially after the Board has decided not to pursue the public interest.

Furthermore, the Union's right to petition the Circuit Court for a rehearing should not be conditional upon its intervention in the first instance. The Union was always the real party in interest, both before the Board and before the Court. To require *all* unions to intervene, in the first instance, at the appellate court level, will, in our opinion,

cause the addition of unnecessary parties, since, in most cases, the union's interest and the Board's interest are identical. Moreover, it tends to favor form over substance.

Finally, even if a charging party's right to intervene is *originally* limited to the time when the enforcement proceedings are commenced, we submit that the *right* to intervene was revived after the Board abandoned the case. Thus, while the Board was in the case protecting the Union's interests, there was, in effect, a tolling of the statute of limitations. The statute did not begin to run against the Union's right to intervene until after the Board notified the Union of its desire not to proceed with this case (or approximately one week before the filing of the motion to intervene and petition for rehearing). See *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting*, 325 U.S. 335.

Furthermore, the Board has advised the petitioner that it will oppose this petition, notwithstanding the fact that it believes the Seventh Circuit made an incorrect decision below. Unfortunately, the Solicitor General of the United States apparently believes that he must oppose any petition for certiorari that he himself would not initiate. We believe this creates an unhappy and unfair state of events. The Board, which is charged with the responsibility both of protecting the rights of workers and effectuating the purposes of the Act, is in effect, our opponent when we seek to achieve those same ends. Fortunately, however, this Court, rather than the Board, is invested with the authority to review cases decided by the Courts of Appeals. *UAW* v. *Scofield & Fafnir*, 382 U.S. at 222. See also, *Steelworkers* v. *Labor Board*, 373 U.S. 908.

The Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion.

A. The Judicial Review Standard

The standards long recognized and applied by the Courts (especially the Seventh Circuit) in reviewing Board determinations are set forth in *NLRB* v. *Krieger-Ragsdale & Co.*, 379 F.2d 517, 520 (7th Cir. 1967), cert. denied, 389 U.S. 1041.

> The function of the substantial evidence rule in Board determinations is to examine the adequacy of the facts as found, not to test the judgment upon them. In the instant case, the substantial evidence standard does not have controlling application, for there is no actual contest over basic facts. The controversy relates essentially to judgment on the facts. Our function, therefore, is to review the Board's exercise of discretion and determine whether the Board's determinations were reasonable, as applied to the facts.

Or, as this Court stated in *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 380 (1945):

> The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion, but to "guarantee against arbitrary action by the Board."

The decision of the Seventh Circuit is in conflict with these principles. The Board had determined *on the basis of the record,* that District 65's relationship with NAWCAS

does *not* present a clear and present danger to the interests of the employees on whose behalf it seeks bargaining rights. That finding should not have been disturbed unless it was arbitrary and capricious.

It was not the Seventh Circuit's function to substitute its judgment on a given state of facts for that of the National Labor Relations Board, which is charged, under the mandate of the Administrative Procedures Act, to exercise its unique expertise in labor matters and making findings of fact and law.

The Seventh Circuit's sole function was to hear arguments, read the record and the briefs and determine, thereupon, whether the NLRB's Decision and Order was supported by substantial evidence. It was no part of the Court's business to become involved in a *de novo* evaluation of the merits of the case.

B. The Record Relied on by the Board

The record *in this case* makes the fact absolutely clear that *only* District 65 has responsibility for collective bargaining on behalf of its members, irrespective of what other organizations such members might belong. Under no circumstances would NAWCAS veto any decision made by District 65 and the salesmen it represents. Appendix at page 29a.

The Court's conclusion that District 65 "*may* bargain, not for the benefit of the unit employees, but for the protection and enhancement of NAWCAS" was sheer speculation and should not be permitted to stand. As the Board

pointed out in its brief to the Court of Appeals such allegations are "conjectural and too premature to warrant consideration." Board brief, p. 17.

Moreover, the Board has stated clearly, both in its direction of election in the instant case and in its brief to the Seventh Circuit (Board brief, p. 18):

> * * * if [District 65] is certified and refuses to maintain an independent course in representing unit employees, or if in bargaining the [Company] has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine [District 65's] conduct when the Board's established procedures are appropriately invoked for such purposes. Appendix at p. 36a.

The Board distinguished those cases where the petitioning organization was disqualified because they involved unions that were conceived, organized and governed by officers of an existing, disqualified union for the sole apparent purpose of obtaining bargaining rights for the latter. The Board stated to the Seventh Circuit:

> The facts here are clearly distinguishable. As previously shown, District 65 is a long-established labor organization fully capable of independently representing the Company's employees. It obtained authorization cards, requested recognition and filed a petition in its own name. And it indicated that it alone will represent the unit employees. In similar circumstances, the Board has consistently refused to deny the processes to the petitioning union. Board brief, p. 16.

The effect of this erroneous decision is devastating to the petitioner. While the Board and the Seventh Circuit would tend to treat this case as a garden-variety, run-of-the-mill enforcement case, the net effect is to deny the Congressionally declared *right* of collective bargaining to thousands of salesmen throughout the country.

The Seventh Circuit's decision, if permitted to stand, would represent the first reported decision of an existing, legitimate union being denied access to the Board's processes merely because of its association with another group. Thus, not only does the decision violate the Union's statutory rights, but also imposes a prior restraint upon the Union and its members, thereby violating constitutionally protected rights as well.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Decision of the Circuit Court

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1971 — April Session, 1972

[SAME TITLE]

Argued April 27, 1972 — Decided September 21, 1972

Before PELL and STEVENS, *Circuit Judges,* and LARAMORE, *Senior Judge.**

PER CURIAM. The National Labor Relations Board seeks enforcement of a bargaining order based on its findings that the employer (Kaufmann)[1] violated §§8(a)(1) and 8(a)(5) of the National Labor Relations Act[2] by refusing to bargain with the union (District 65).[3] The question presented is whether District 65 merits certification as the collective bargaining representative of Kaufmann's employees despite its close relationship and affiliation with the National Association of Women's and Children's Apparel Salesmen, Inc. (NAWCAS), an organization previously denied certification by the Board on conflict of interest grounds. We hold that the Board's reasons for disqualifying NAWCAS also disqualify District 65; it is not sufficiently independent of NAWCAS to insure good faith representation of the employees in the bargaining unit.

* Senior Judge Don N. Laramore of the United States Court of Claims is sitting by designation.

1. R & M Kaufmann, a Division of Russ Togs, Inc.

2. 29 U.S.C. §158(a)(1) and (5).

3. District 65, Wholesale, Retail, Office and Processing Union.

Decision of the Circuit Court

District 65 is a long established labor union presently representing almost 30,000 members under more than 2,000 individual collective bargaining agreements. Prior to its affiliation with NAWCAS, however, it had never represented traveling apparel salesmen who participate in trade shows organized and conducted by NAWCAS and its affiliate members. The majority of NAWCAS' members are independent contractors and are not entitled to union representation under §2(3) of the Act. The rest are protected by the Act as employee traveling salesmen for individual apparel manufacturers.

Starting in 1965, NAWCAS sought to achieve union status with the help of District 65. The two organizations originally operated under an informal working arrangement; a formal affiliation agreement was signed on July 20, 1967. Under the agreement, District 65 carries on essentially all the "union" functions of NAWCAS. NAWCAS, on its part, collects dues for District 65 from its members, continues to carry on its trade association activities, and retains the right "to make all decisions affecting the interests of its members in accordance with its constitution and by-laws."[4]

4. J.A. 198. The Board has not explained the underlying reason for any continued formal affiliation between NAWCAS and District 65. There is reason to believe that NAWCAS originally hoped that recognition as a labor organization might exempt certain of its activities from scrutiny by the Federal Trade Commission. See National Association of Women's and Children's Apparel Salesmen, Inc., F.T.C. Docket No. 8691, CCH Trade Reg. Rep. ¶19,538 (Initial Order) (July 30, 1970); *Bambury Fashions, Inc.*, 179 NLRB 447, 72 LRRM 1350 (1969). It is possible that NAWCAS' present affiliation with District 65 has the same or a related purpose. In any event, the potential threat to free competition inherent in arrangements between trade associations and unions makes it imperative that the Board thoroughly understand the reason for such an alliance before certifying a union which is formally affiliated with an association already disqualified on conflict of interest grounds.

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Decision of the Circuit Court

The first attempts by the NAWCAS-District 65 combination to organize employee traveling salesmen were frustrated by the Board's decision in *Bambury Fashions, Inc.*, 179 NLRB 447, 72 LRRM 1350 (1969). There, a joint NAWCAS-District 65 certification petition was denied on the ground that NAWCAS was disqualified by its conflict of interest. The Board properly recognized that NAWCAS might subordinate the interests of the employee traveling salesmen (who composed the units in question) to those of the independent contractors. Similarly, NAWCAS, whose primary activity is the operation of trade shows, might oppose joint manufacturer-employee salesmen interests in manufacturer operated trade shows. Disqualification because of such conflicting interests is a necessary measure to assure good faith representation in collective bargaining.[5] Neither this principle nor the holding of *Bambury* is questioned in this proceeding.

NAWCAS and District 65 jointly conducted the Kaufmann organizing campaign during the pendency of *Bambury* in 1969. Kaufmann's employee-salesmen were asked to sign two different representation cards—one designating "NAWCAS-District 65" as the bargaining agent (apparently following the *Bambury* pattern) and the other designating only "District 65." The stated reason for the

5. *N.L.R.B.* v. *David Buttrick Co.*, 399 F.2d 505 (1st Cir. 1968), *enforcing David Buttrick Co.*, 167 NLRB 438 (1967); *N.L.R.B.* v. *David Buttrick Co.*, 361 F.2d 300 (1st Cir. 1966), *remanding* 154 NLRB 1468 (1965); *Welfare & Pension Funds (United Bhd. of Carpenters)*, 178 NLRB 14, 71 LRRM 1610 (1969); *General Teamsters, Local 249*, 139 NLRB 605 (1962); *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1957); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954).

use of two cards was to avoid "entanglements" at the Labor Board. J.A. 57.

On March 26, 1969, NAWCAS-District 65 jointly requested a meeting with management. On April 18, Kaufmann responded that in view of the *Bambury* proceeding, it doubted whether NAWCAS-District 65 could represent the unit. The joint campaign continued until May 22, when NAWCAS-District 65 withdrew its request for recognition. At the same time, District 65 individually sought recognition, relying on the alternate representation cards. This change in form was not accompanied by any change in substance. NAWCAS and District 65 remained affiliated, and NAWCAS officers still were capable of influencing if not controlling District 65.

In the subsequent certification proceeding, Kaufmann argued that the union's close ties with NAWCAS barred certification. The Board rejected the defense and ordered an election which District 65 won. Following Kaufmann's renewed refusal to bargain, the Board again rejected Kaufmann's arguments and ordered it to bargain with District 65. Kaufmann then petitioned for review in this court, and the Board cross-petitioned for enforcement of its bargaining order.

The Board argues that District 65's established history as an independent labor union and its expressed intent to act independently in representing the bargaining unit are controlling in a certification proceeding. If these arguments were sufficient, potential conflicts of interest would

seldom, if ever, be disqualifying.[6] The Board suggests, however, that ample protection is afforded by the availability of decertification. If District 65 "refuses to maintain an independent course in representing unit employees, or if in bargaining the Employer has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine Petitioner's conduct when the Board's established procedures are appropriately invoked for such purpose." 187 NLRB. No. 20 (J.A. 24).

Under the Board's suggested procedure, the employer would have to challenge the union in a decertification context with proof of actual misconduct by the bargaining representative. Postponing any protection against the risk that conflicting interests may infect the bargaining process until actual damage has been done is inconsistent with the Board's proper evaluation of the potential for harm evidenced by its decision in *Bambury*. Disqualification of a bargaining representative whose independence and loyalty are properly drawn into question should not await proof of actual misconduct. Rather, the Board must focus on the potential for such misconduct before the union is certified.

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6. District 65's established history as a labor union representing employees in entirely separate areas of the economy is not material to the question whether its affiliation with NAWCAS disqualifies it from representing Kaufmann's employees. The Board has not previously granted such deference to the fact that a union is well established. See, *e.g.*, *General Teamsters, Local 249*, 130 NLRB 605 (1962); *Oregon Teamsters' Security Plan Office*, 119 NLRB 207 (1957); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). Likewise, if a party's expressed intent to act independently were adequate to avoid the conflict of interest objection, the objection would have little, if any, force.

We agree with Judge Coffin's criticism of the test applied by the Board:

> "The principles attaching to the concept of conflicts of interest in the fiduciary field generally, and also in the field of collective bargaining, look to the prevention and forestalling of conditions which are likely to divide loyalties. Were proof of union 'betrayal' required to trigger the application of sanctions, this constructive operation of the law would be largely nullified. We therefore take issue, not with the interpretation of the testimony, nor, of course, with the facts as revealed by the documentary evidence, but rather with the test or standard applied and the application of the undisputed facts to such standard." *N.L.R.B.* v. *David Buttrick Co.*, 361 F.2d 300, 304-305 (1st Cir. 1966).

As the Board recognized in *Bambury*, "what disqualifies a union from acting . . . is the latent danger that it may bargain, not for the benefit of unit employees, but for the protection and enhancement of [other interests]." 179 NLRB at 451, 72 LRRM at 1354.

The record is replete with proof of the close relationship between NAWCAS and District 65. Mere assertions that they have acted or will act independently are not material even if believable; their continued close relationship in and of itself creates the danger that District 65 "may bargain, not for the benefit of unit employees, but for the protection and enhancement of" NAWCAS. *Ibid.* We conclude that the same conflict of interest which disqualified NAWCAS in *Bambury* also disqualifies District 65, which

owes loyalties both to NAWCAS and to the employees in the bargaining unit.

Employer's petition for review is granted; the Board's cross petition for enforcement is denied.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Order Denying Intervention and Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 27, 1972

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. John Paul Stevens, Circuit Judge

Hon. Don H. Laramore, Associate Justice
Court of Claims

[SAME TITLE]

This matter is before the Court on the motion of District 65, Distributive Workers of America, for leave to intervene and to be made a party to this proceeding and for leave to file its petition for rehearing, and on the memorandum in opposition to said motion filed by petitioner, R & M Kaufmann, A Division of Russ Togs, Inc. On consideration whereof,

IT IS ORDERED that said motion be and the same is hereby DENIED.

NLRB Decision and Order Requiring Company to Bargain

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[SAME TITLE]

Upon a charge filed on March 11, 1971, by District 65, Wholesale, Retail, Office and Processing Union, herein called the Union, and duly served on R & M Kaufmann, a Division of Russ Togs, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on April 1, 1971, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 26, 1971, following a Board election in Case 13—RC—11887 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 26,

1. Official notice is taken of the record in the representation proceeding, Case 13—RC—11887, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

1971, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 11, 1971, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent admits that in the Board-conducted election of January 18, 1971, a majority of its employees selected the Union as its bargaining representative and that on January 26, 1971, the Union was certified as exclusive collective-bargaining representative of employees in the unit found to be appropriate. Respondent denies, however, that the Union is a representative or labor organization within the meaning of the Act and asserts that the Union's certification is invalid since it defines an inappropriate unit.

On April 20, 1971, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 26, 1971, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, characterized as an Answer to Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

NLRB Decision and Order Requiring Company to Bargain

Ruling on the Motion for Summary Judgment

In its answer to the complaint and to the Motion for Summary Judgment Respondent contends that the Union does not qualify as a labor organization or, alternatively, that it is disqualified from representing apparel salesmen. It further denies that the unit set forth in the complaint is an appropriate unit. Accordingly, it prays that the Board deny the Motion for Summary Judgment.

Respondent's contentions present the same representation issues which had been considered and determined by the Board in its Decision and Direction of Election (187 NLRB No. 20) issued in the antecedent representation proceedings in Case 13—RC—11887. There the Board found that the union met the Act's definition of a labor organization, rejected respondent's contention that the bargaining unit should include resident salesmen and granted the union's request for a unit limited to traveling commission salesmen. Accordingly, we find no merit in the Respondent's contentions.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation

2. See, *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a New York corporation, with a plant and place of business in Aurora, Illinois, is engaged in the manufacture and sale of women's apparel. During the past fiscal or calendar year, Respondent manufactured, sold, and shipped finished products valued in excess of $1 million from its plant in Aurora, Illinois, directly to customers located in States of the United States other than the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

District 65, Wholesale, Retail, Office and Processing Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All traveling commission sales employees, excluding all other employees, resident sales employees, showroom employees, factory employees, office employees, shipping and receiving employees, stock employees, trucking employees, guards and supervisors as defined in the Act.

2. The certification

On January 18, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 13 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on January 26, 1971, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about February 23, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 26, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since February 26, 1971, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. R & M Kaufmann, a Division of Russ Togs, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 65, Wholesale, Retail, Office and Processing Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All traveling commission sales employees, excluding all other employees, resident sales employees, showroom employees, factory employees, office employees, shipping and receiving employees, stock employees, trucking employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 26, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 26, 1971, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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NLRB Decision and Order Requiring Company to Bargain

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, R & M Kaufmann, a Division of Russ Togs, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, Wholesale, Retail, Office and Processing Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All traveling commission sales employees, excluding all other employees, resident sales employees, showroom employees, factory employees, office employees, shipping and receiving employees, stock employees, trucking employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of em-

ployment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant and place of business in Aurora, Illinois, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. July 9, 1971.

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

3. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NLRB Decision and Order Requiring Company to Bargain

Appendix

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, Wholesale, Retail, Office and Processing Union as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All traveling commission sales employees, excluding all other employees, resident sales employees, showroom employees, factory employees, office employees, shipping and receiving employees, stock employees,

trucking employees, guards and supervisors as defined in the Act.

R & M KAUFMANN, A DIVISION OF RUSS TOGS, INC.
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 881, Everett Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312—353-7572.

Motion for Leave to Intervene

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[SAME TITLE]

The motion of District 65, Distributive Workers of America, (District 65), respectfully shows to the Court:

1. District 65 is a long established labor union presently representing almost thirty thousand (30,000) members in New York, New Jersey, Illinois, California, Connecticut and Arizona. Its principal office is located in the City and State of New York.

2. The above proceedings (which resulted in this Court's decision of September 21, 1972) were initiated by the National Labor Relations Board upon the refusal to bargain charges filed by the aforesaid Union against R & M Kaufmann, a division of Russ Togs, Inc.

3. After a lengthy hearing before the Regional Office of the Board in Chicago, Illinois, the Board rejected Kaufmann's argument that District 65 was "fronting" for the National Association of Women's and Children's Apparel Salesmen, Inc. (NAWCAS) and ordered Kaufmann to bargain with the Union after District 65 had won a Board conducted election and was duly certified as the exclusive bargaining agent for the traveling salesmen employed by Kaufmann.

4. Kaufmann filed a petition for review of said order. The Board cross-petitioned for enforcement of its order. District 65 did not move to intervene then because the Board's application to vindicate public rights coalesced with the rights of the Union as Charging Party and as bargaining representative of the employees.

5. On September 21, 1972, a panel of this Court consisting of Circuit Judges Pell and Stevens and Senior Judge Laramore of the U.S. Court of Claims, sitting by designation, denied enforcement of the Board order. In so doing the Court held *inter alia*, that "District 65 is not sufficiently independent of NAWCAS (an organization previously denied certification by the Board on independent contractor grounds) to insure good faith representation of the employees in the bargaining unit." (Slip op. 2); further, that "NAWCAS officers still [are] capable of influencing, if not controlling District 65." (Slip op. 4)

6. It is respectfully submitted that the aforesaid opinion of the Court is in error with respect to the facts and the law. The accompanying petition for rehearing (which we pray this Court will entertain) sets forth the urgent reasons why a rehearing is necessary.

7. We submit that this motion for intervention should be granted since District 65 has been a real party in interest herein at all times. While the nominal parties to the proceeding have been the Board and Kaufmann, District 65 has always had a substantial legal and equitable interest herein.

8. The Board has decided not to petition this Court for rehearing nor apply for certiorari. However, if asked by

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the Court, the Board has indicated it would support both this motion and the petition for rehearing.

9. Unless this motion is granted, District 65 will not have the opportunity to persuade this Court, or the Supreme Court if necessary, of the gross injustice done herein.

10. In similar circumstances the Sixth Circuit permitted a Charging Party to intervene after it denied enforcement, in part, to a Board order. The Court's original decision adversely affected the Charging Party. The case is *Taylor* v. *Johnson,* 322 F2d 216 (6th Cir., 1963), cert. denied, 376 U.S. 951 (1964). The order permitting intervention is unpublished but is dated November 29, 1963, and signed by Circuit Judge Weick. The Court relied on *International Union of Mine, Mill and Smelting Workers, Local 13* v. *Eagle-Picher Mine and Smelting Company,* 325 U.S. 335 (1945).

WHEREFORE, District 65 respectfully moves this Court for leave to intervene and be made a party to the above entitled proceeding and for an order granting leave to file its petition for rehearing as herein submitted.

Dated: New York, New York
October 6, 1972

Respectfully submitted,

Eisner & Levy,
Attorneys for District 65,
Distributive Workers of America
351 Broadway
New York, New York 10013
Tel. (212) 966-9620
By: Eugene G. Eisner

Petition for Rehearing *En Banc* on Behalf of District 65, Intervenor

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[SAME TITLE]

District 65, Distributive Workers of America, respectfully petitions the Court for rehearing *en banc* to reconsider the decision entered in this case on September 21, 1972.[1] The Court's decision denies enforcement of the Board's order directing the Company to bargain with District 65, the certified representative selected by a unit of its employees on the ground that District 65 "is not sufficiently independent of the National Association of Women's and Children's Apparel Salesmen, Inc. (NAWCAS) to insure good faith representation of the employees in the bargaining unit."

NAWCAS had previously been denied certification by the Board on independent contractor grounds.[2] Because of an affiliation agreement between NAWCAS and District 65 (that had been *substantially* modified prior to the commencement of original representation hearing before the Board, [J.A. 48, 106-113, 127-129]), the Court reasoned that District 65 should likewise be disqualified because it "owes loyalties both to NAWCAS and to the employees in the bargaining unit." (Slip op. 5)

1. The panel consisted of Circuit Judges Pell and Stevens and Senior Judge Laramore of the U.S. Court of Claims, sitting by designation.

2. *Bambury Fashions, Inc.*, 179 NLRB 447 (1969).

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In rejecting the Board's conclusion that District 65 was entitled to certification because it was a separate, well-established labor organization and had demonstrated that it was functioning *independently* as a bargaining agent for wholesale apparel employees and would do so on behalf of the Kaufmann employees (J.A. 24; 129), the Court took issue with the Board's practice of policing its own certifications through its *revocation* procedure (J.A. 24) by stating that "the employer would have to challenge the union in a *decertification* context with proof of actual misconduct by the bargaining representative." (Slip op. 4, emphasis added). Moreover, despite the absence of contrary evidence in the record (J.A. 118, 122, 141; S. A. 1), the Court found that "NAWCAS officers still were capable of influencing if not controlling District 65." (Slip op. 4)

The case is appropriate for rehearing *en banc* because (1) the Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion and (2) because the Court misapprehended some fundamental facts and misconstrued the law. The decision destroys the right of self-organization for wholesale apparel salesmen in the United States and, in turn, severely interferes with District 65's right to organize such salesmen.

I. The Judicial Review Question

The standards long recognized and applied by this Court in reviewing Board determinations are set forth in *NLRB v. Krieger-Ragsdale & Co.*, 379 F.2d 517, 520 (7th Cir., 1967), cert. denied, 389 U.S. 1041.

> The function of the substantial evidence rule in Board determinations is to examine the adequacy of the facts as found, not to test the judgment upon them. In the instant case, the substantial evidence standard does not have controlling application, for there is no actual contest over basic facts. The controversy relates essentially to judgment on the facts. Our function, therefore, is to review the Board's exercise of discretion and determine whether the Board's unit determinations were reasonable, as applied to the facts.[3]

Or, as the Supreme Court stated in *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 380 (1945):

> The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion, but to "guarantee against arbitrary action by the Board."

The decision of the Court here is in conflict with these principles. Even if the Court were correct on the facts (namely, that NAWCAS officers have the potentiality of controlling District 65), the Court had no justification to set aside the Board's discretionary determination on those facts. Thus, the Board's judgment that District 65's relationship with NAWCAS does *not* present a clear and present danger to the interests of the employees on whose behalf it seeks bargaining rights (Board brief, pp. 13, 17) should not be disturbed unless such a finding is arbitrary or capricious.

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3. See also, *Macomb Pottery Company* v. *NLRB*, 376 F. 2d 450, 452 (7th Cir., 1967), where this Court stated, "The general standard for judicial review of a certification is whether the Board abused its discretion."

Moreover, the Board has stated clearly, both in its direction of election in the instant case (J.A. 24) and in its brief to this Court (Br. p. 18):

> • • • if [District 65] is certified and refuses to maintain an independent course in representing unit employees, or if in bargaining the [Company] has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine [District 65's] conduct when the Board's established procedures are appropriately invoked for such purposes.

The Court, in an attempt to apply this policy of the Board to the facts herein, apparently has misunderstood it. At page 4 of its opinion the Court speaks of the Board's *decertification* procedures as distinguished from its revocation procedures. This is not a mere distinction without a difference, for in the former process (which the Court believed was applicable) an *election* to decertify a union could *only* be held at the end of a three year period following a showing of interest by thirty percent (30%) of the bargaining unit, whereas in the latter process, the Board could *revoke* the certification *at any time* when presented with evidence by *anyone*, that the union was "refusing to maintain an independent course in representing unit employees." (J.A. 24)[4]

4. The actual effect of believing that an employee would be "locked in" to a contract for three years rather than being able to have the Union's certification revoked at any time, is just too difficult to measure. District 65 should have an opportunity to clarify this point in the total context of the case to remove whatever prejudice might have flowed from such a misconstruction.

Finally, on this point, as the Board argued in its brief (p. 18), "we submit that the striking of the balance in favor of employee free choice was not unreasonable in this case." We agree. The Board's finding should have not been disturbed.

II. Misapprehension of the Facts and the Law

A. The Facts

The Court apparently has relied heavily upon the allegedly continuing "formal affiliation agreement" between NAWCAS and District 65 in reaching its conclusion that District 65 must be disqualified from representing wholesale apparel salesmen. At page 2 of its decision the Court quotes a portion of the affiliation agreement whereby NAWCAS retains the right "to make all decisions affecting the interests of its members in accordance with its constitution and by-laws." The Court concludes from this language that "NAWCAS officers still were capable of influencing if not controlling District 65." (Slip op. 4) On the facts, the conclusion is unwarranted.

As the Board pointed out in its brief to the Court (p. 14), "The Company's contention that NAWCAS retains the ultimate authority to make decisions in collective bargaining is simply not substantiated by the record."

In the first place, *even under the affiliation agreement*, NAWCAS officers *never* were capable of controlling District 65 with regard to matters of collective bargaining which were within District 65's long history of expertise (J.A. 198). The right of NAWCAS, under that agreement,

to "make all decisions affecting the interests of its members in accordance with its constitution and by-laws" could not, by any stretch of the imagination, ever confer the right of NAWCAS officers "to control District 65." As a trade association, operating under its own organic documents, NAWCAS controls its members as they are NAWCAS members and with regard to matters within the ambit of NAWCAS' responsibility, but not insofar as such members are members of a bargaining unit and employees within the meaning of the National Labor Relations Act.

Moreover, it was abundantly clear in the record that since that affiliation agreement was first signed in 1967, *a new arrangement* had been entered into (prior to the filing of District 65's petition for certification with the Board)[5] whereby District 65 assumed *full* responsibility for collective bargaining, with NAWCAS acting only in an advisory capacity. Under no circumstances would NAWCAS have the power to veto any decision made by District 65 and the salesmen it represents. (J.A. 107-108, 118-120, 134, 135, 138, 141; S.A. 1).

District 65 Organizer Levine's testimony that NAWCAS had the *authority* to make the ultimate decision in the event of an unresolved disagreement over a bargaining policy (J.A. 143) was obviously made with reference to the language of the affiliation agreement prior to its modification, as a reading of the entire text of the relevant testimony clearly reveals (J.A. 135-144; S.A. 1). The

5. The new arrangement was first discussed in March of 1969, agreed upon in May of 1969 and ratified in July of 1969 (J.A. 48, 106-108, 110-113, 127-129).

Court surely must have overlooked these essential facts when it relied on the language of the affiliation agreement itself (Slip op. 2).

The Court's statement that "District 65 owes loyalties both to NAWCAS and to the employees in the bargaining unit" (Slip op. 5) is just not borne out by the record. The statement that District 65 "*may* bargain, not for the benefit of unit employees, but for the protection and enhancement of" NAWCAS (quoting the *Bambury* decision) is sheer speculation and without any foundation in fact. Any person or agency (such as the Board) that is familiar with District 65 and its history as a progressive, independent labor union, knows that statement is just not true!

Moreover, since the Board hearing was first held in 1969, District 65 has had a history of organizing and bargaining for other wholesale apparel salesmen. Perhaps the Court ought to remand the case to the Board to receive evidence of whether District 65's "willingness," in 1969, to separately represent such salesmen has actually occurred.

B. The Law

We submit that the Court's reliance on the *Bambury* case, *supra*, (wherein NAWCAS was disqualified) to disqualify District 65 *in this case* was wholly misplaced.[6] In the first place, although the petition in that case was NAWCAS-District 65, it was NAWCAS that was disqualified by the Board and not District 65.

6. The Union is not quarreling here with the *Bambury* decision itself, only with the Court's application of the *Bambury* case.

Moreover, the Board disqualified NAWCAS in *Bambury* because of *its* "clear and immediate conflicts" with *its* representational duties. There are no such clear and immediate conflicts within District 65 itself; rather, it is disqualified by *association.*

We submit that neither the Courts nor the Board have ever applied the "guilt by association" standard for certification purposes. In each and every case cited by the Court where the conflict question arose, (Slip op. 4, f.n. 6) the union *itself* which was *engaging in activities* that conflicted with its representational status. Thus, in *General Teamsters, Local 249,* 139 NLRB 605 (1962) and *Oregon Teamsters Security Plan Office,* 119 NLRB 207 (1957) the petitioners were *employers* of members in the same international union and in *Bausch & Lomb Optical Co.,* 108 NLRB 1555 (1954), again the union was an employer in *direct competition* with employers whose employees the union sought to represent. There is no reported case of a legitimate existing union that has been denied access to the Board's processes merely because of its *association* with another group. Such action is tantamount to a prior restraint. Cf. *Alto Plastics Manufacturing Corp.,* 136 NLRB 850 (1962); *Hotel Properties, Inc., d/b/a Landmark Hotel & Casino,* 194 NLRB No. 139 (1972).

One final note: One could argue that the Court's decision leaves room for District 65 and NAWCAS to disaffiliate thereby giving District 65 the opportunity to organize by and for itself. The only thing wrong with that argument is that if the Court's decision is permitted to stand, District 65 will forever carry the "taint" of

NAWCAS with it and probably never organize wholesale apparel salesmen. We don't think that was the Court's intention.

Conclusion

For the reasons stated, District 65 respectfully requests that the case be reheard by the Court *en banc*, and that after such rehearing a decree be issued enforcing the Board's order. In the alternative, it is requested that the case be remanded to the Board.

Respectfully submitted,

Dated: New York, New York
October 6, 1972

EISNER & LEVY
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Tel. (212) 966-9620

By:
/s/ Eugene G. Eisner

EUGENE G. EISNER

NLRB Decision and Direction of Election

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[SAME TITLE]

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Arthur B. Muchin. Briefs were filed by the Employer and by the Petitioner.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.[2]

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Petitioner, District 65, Wholesale, Retail, Office and Processing Union, herein called the Petitioner or Dis-

1. The Employer's name appears as corrected at the hearing.

2. Following the transfer of this proceeding to the Board the Employer filed a motion to admit into evidence two additional exhibits which allegedly came to its attention after the hearing in this case was adjourned. The Petitioner filed a motion in opposition to the Employer's motion. These exhibits, offered long after the hearing in this case had closed, appear to constitute hearsay evidence as to the Petitioner's position in this proceeding and, as the Petitioner objects to their admission, we reject them.

trict 65, seeks to be certified as representative of a unit of the Employer's traveling commission sales employees. The Employer contends that District 65 is not a labor organization qualified to act as representative of these employees because of its affiliation with NAWCAS,[3] which the Board, in the *Bambury* case,[4] found to be affiliated with a conflict of interest such that it is disqualified from acting as a labor organization representative of such employees.[5]

The record shows that in December 1967 NAWCAS Guild[6] and District 65 entered into a certain contract of affiliation under which these two organizations might jointly engage in efforts to secure collective-bargaining representation for apparel salesmen. The group thus formed became known as NAWCAS-District 65, which in March 1969 requested the Employer to recognize it as collective-bargaining agent for the Employer's traveling apparel salesmen. The Employer denied this request, asserting that it doubted that NAWCAS-District 65 was a labor organization within the meaning of the Act. Subsequently, in May 1969, NAWCAS-District 65 withdrew this recognition request and District 65 alone requested the Employer to recognize

3. National Association of Women's and Children's Apparel Salesmen, Inc.

4. *Bambury Fashions, Inc.*, 179 NLRB No. 75.

5. The Board, in *Bambury*, dismissed several petitions filed by NAWCAS and District 65 as joint petitioners on the ground that NAWCAS' interest in representing employee salesmen conflicts substantially with its primary interest in coordinating and strengthening trade show activities for independent contractor salesmen who are engaged in the business of selling apparel in direct competition with apparel manufacturers.

6. This is the name under which NAWCAS sought to constitute itself a labor organization and to engage in collective-bargaining activities.

it as representative of the Employer's traveling apparel salesmen. The Employer refused to grant such recognition on the ground that it deemed District 65 to be merely fronting for the affiliated organization NAWCAS-District 65. The Petitioner, District 65, then, on May 26, 1969, filed its petition in this proceeding with the Board.[7]

In its opposition to this petition the Employer points to the attempt by NAWCAS, over a period of years, to enter the field of collective bargaining, and particularly its efforts to gain the benefits of collective bargaining through a joining of its efforts with the long-established labor organization, District 65. The Employer asserts that the affiliation of NAWCAS and District 65 through the contract executed in 1967 essentially resulted in uniting these two organizations in a manner such that District 65's petition for representation of apparel salesmen is in effect also a NAWCAS petition, by reason of which it follows that District 65 is likewise tainted with the stigma of disqualification which the Board found to attach to NAWCAS in its *Bambury* decision.

District 65, however, points to the fact that despite its execution of the 1967 agreement with NAWCAS, it has continued to exist as a separate labor organization, having its own constitution, officers, and organizational structure, that it has continued separately to engage in the representation of employees for collective bargaining, and that here it asks for certification of itself alone as representative of the employees involved in this proceeding.

7. This petition was held in abeyance pending the Board's determination in the *Bambury* case, *supra*, following which the parties filed briefs relating to the effect of the Board's decision in that proceeding upon the merits of District 65's petition in the present case.

NLRB Decision and Direction of Election

We find merit in District 65's position. We have carefully reviewed the entire record and also have taken official notice of our own proceedings, which show that over a period of years District 65 has appeared and been recognized as a labor organization in proceedings before this Board, including such an appearance as recently as 1970,[8] quite independently of NAWCAS. We find that Petitioner is an existing separate labor organization and conclude that it is Petitioner's willingness itself to function as a bargaining agent which is the controlling factor in these circumstances. We shall therefore direct an election upon District 65's petition. However, if Petitioner is certified and refuses to maintain an independent course in representing unit employees, or if in bargaining the Employer has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine Petitioner's conduct when the Board's established procedures are appropriately invoked for such purpose.

3. We find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner contends that the appropriate unit consists of all the Employer's traveling commission sales employees. The Petitioner would exclude the Employer's resident sales employees contending, in part, that some of

8. *New York Paper Cutters & Bookbinders Union No. 119*, 182 NLRB No. 3, issued April 17, 1970, determining a jurisdictional dispute in the printing industry.

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them are managerial employees or supervisors. The Employer contends that the unit shrould include the resident sales employees.

The Employer employs approximately 23 traveling commission salesmen, each of whom sells ladies' garments manufactured by the Employer to retailers located within a territory specified in the salesman's employment contract.[9] These salesmen are compensated solely by commissions, are required to purchase their samples, and pay their own traveling expenses. The Employer assigns a sales quota to each traveling commission salesman and promotes competition among the salesmen to meet and exceed their quotas. There are six resident sales employees, as follows:

Adrian Altschul is located at the Employer's sales office and showroom in Chicago. He is designated as a vice president of the Employer in charge of styling and is employed under a contract totally unlike those of the traveling commission salesmen, which designates him as an executive and holds him responsible for performing the duties of an executive officer.[10] Under the contract he is paid a salary and is eligible to participate in stock option, bonus, extra compensation, and pension and group insurance plans. A part of his time, he travels to service "house accounts" and is entitled, under his contract, to a specified

9. These employment contracts are in some respects similar, but not identical, to the standard contract set forth in the decision in *Bambury, supra.* In particular, the language there cited as indicative of independent contractor status does not here appear. And no party here contends that the traveling commission salesmen are other than employees of the Employer.

10. The contract does not, however, specify the precise nature of such executive duties.

commission on all merchandise sold by the Employer to certain departments of downtown stores in several principal cities and on certain other selected accounts. When he travels, his samples are provided without expense, and this traveling and entertainment expenses are to a considerable extent reimbursed.

Joel Kaufmann is the son of the president of R & M Kaufmann, which, until it became a division of Russ Toggs, was a closely held family corporation in which he was a stockholder. He is designated as a vice president in charge of styling. Like Altschul, he is employed at Chicago under a contract calling for executive duties and participation in the Employer's various stock option and other plans. He also sometimes travels to service "house accounts" and is entitled under his contract to a commission on all merchandise sold in certain departments of downtown stores in several principal cities. His samples are likewise provided and his travel expenses are reimbursed.

Ronald Kaufmann, also a son of R & M Kaufmann's president and a stockholder in the family corporation prior to its acquisition by Russ Toggs, is assigned to the New York showroom. He travels occasionally to service "house accounts," and on these occasions he is provided with samples and reimbursed for his travel and entertainment expenses. But he receives no compensation other than a salary. The record shows that he is listed as a company stockholder and is classified as a management trainee.

Robert Gould is located at the New York showroom, carries the title of sales manager,[11] and participates in the

11. The Employer asserts that this title was adopted merely to impress the customers.

executive pension plan. He is compensated entirely by salary, and is reimbursed for his expenses in event he travels or entertains.

Constance Wojsiat is employed at the New York showroom and *June Keeshin* at the Chicago salesroom. Both perform clerical functions and assist to some extent in selling. They also perform the duties of receptionist. Both are paid exclusively by salary, at a rate substantially below that of the other employees herein discussed.

Unlike the traveling commission salesmen, all the resident salesmen are paid in whole or in part by salary. Those who sometimes travel do so mainly to service house accounts. They work mostly during regular hours and are given regular vacations, paid holidays, and sick leave. They are not subject to assignment of sales quotas. In view of all the facts, including those set forth above with respect to the individual resident sales employees, we conclude that it is unnecessary to determine here the specific issues raised with respect to those who are alleged to possess managerial or supervisory status, since in any event we find as to all the resident sales employees that their conditions of employment and their interests are sufficiently divergent from those of the traveling commission salesmen that they are properly excluded from the traveling salesmen's unit. Accordingly we find that the following constitutes a unit appropriate for collective-bargaining purposes:

Accordingly, we find the following unit to be appropriate:

> "All traveling commission sales employees employed by the Employer, excluding all other employees,

resident sales employees, showroom employees, factory employees, office employees, shipping and receiving employees, stock employees, trucking employees, guards and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 13 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced.[12] Those eligible

shall vote whether they desire to be represented for collective-bargaining purposes by District 65, Wholesale, Retail, Office and Processing Union.

Dated, Washington, D.C.
Dec. 10, 1970

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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12. In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 13 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Petition for Review

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[SAME TITLE]

R & M Kaufmann, a Division of Russ Togs, Inc., hereby petitions the Court for review of the Order of the National Labor Relations Board which finds petitioner in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act and orders it to bargain collectively with District 65, Wholesale, Retail, Office and Processing Union; said Order being entered on July 9, 1971.

Phillips, Nizer, Benjamin,
Krim & Ballon

By: Jerome B. Kauff
A Member of the Firm

Attorneys for Petitioner
477 Madison Avenue
Office and P. O. Address
New York, New York 10022
Telephone No. (212) 758-6700

Board Cross-Application for Enforcement

[LETTERHEAD OF]

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D. C. 20570

Kenneth J. Carrick, Esquire
Clerk, United States Court of
Appeals for the Seventh Circuit
27th Floor—219 S. Dearborn Street
Chicago, Illinois 60604

Re: No. 71-1511, R & M Kaufmann, a Division of Russ Togs, Inc., v. N.L.R.B.

Dear Mr. Marrick:

I am enclosing an original and four copies of the Board's cross-application for enforcement of its order in the above matter. In lieu of actually transmitting the entire transcript to the Court, the Board pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, is also enclosing an original and four copies of the certified list of all the documents, transcript of testimony, exhibits and other material comprising the record of the proceedings before the National Labor Relations Board.

In accordance with Section 10(e) of the National Labor Relations Act, as amended, will you kindly notify the Petitioner listed on the attached sheet of the filing of this cross-application and certified list. Copies of the cross-application and certified list have this day been served as required by the Rules of the Court. Certificate of service is also enclosed.

Copies of this letter and documents are also being sent to the Regional Office in which the case arose. Although this matter is now being handled directly through the Washington Office, we shall appreciate your keeping the Regional Director, whose name and address are listed on the attached sheet, advised of the progress of this case by furnishing him with copies of all correspondence addressed to me or opposing counsel, and by including him on the list of those to be forwarded a copy of the printed opinion when issued. An envelope addressed to the Regional Director is enclosed for your convenience in mailing the opinion.

Very truly yours,

Marcel Mallet-Prevost
Assistant General Counsel

Attachment: Names and addresses of parties to whom cc & documents are sent.

cc & documents to:

Jerome B. Kauff, Esquire
Phillips, Nizer, Benjamin
Krim & Ballon (Counsel for Petitioner)
447 Madison Avenue
New York, New York 10022

Ross M. Madden, Director
Region 13, N.L.R.B.
881 U. S. Courthouse & F.O.B.
219 South Dearborn Street
Chicago, Illinois 60604

Board Cross-Application for Enforcement

cc to:

Eugene G. Eisner, Esquire
302 West 86th Street
New York, New York 10024

R & M Kaufmann, a Division of
Russ Togs, Inc. (Petitioner)
1601 East Mountain Street
Aurora, Illinois 60507

District 65, Wholesale, Retail,
Office and Processing Union
13 Astor Place
New York, New York 10003

Memorandum in Opposition to Motion for Leave to Intervene

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[SAME TITLE]

POINT I

District 65's motion for leave to intervene should be denied because the motion is untimely.

Federal Rules of Appellate Procedure 15(d) provides that "A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within thirty days of the date on which the petition for review is filed."

International Union, Local 283 v. *Scofield,* 382 U.S. 205 (1965) held that, despite the absence of a clear NLRA directive (id. at 210), "Congress intended intervention rights to obtain" under the design of the Act to permit a successful charging party, such as District 65, to intervene before argument in an NLRA Court of Appeals enforcement/review proceeding (id. at 217). That is, by Supreme Court gloss, *Scofield* held that in a proper case the statute authorizes a timely application for leave to intervene.

District 65 admits that it deliberately chose not to intervene at the appellate level, although it actively participated throughout the entire Board litigation which culminated in this Court's unanimous *per curiam* opinion and judgment entered on September 21, 1972. Its present motion is made

unconscionably far beyond thirty days after the filing of the original petition for review and is time barred.

POINT II

Motion for leave to intervene should be denied because it can serve no purpose.

The stated reason for the motion seeking intervention is to provide standing to movant to file a petition for rehearing.

Federal Rule of Appellate Procedure 40 provides that a petition for rehearing must be filed within fourteen days after entry of the judgment unless the time is enlarged by court order. In this case, within the fourteen-day period after entry of judgment movant did not seek enlargement of time, as indeed it could not since it was not a party. It is now too late to file a petition for rehearing.

The instant motion in fact was first served upon the undersigned by mail on October 10, 1972 (and received October 11, 1972). Although an innocent error, movant's certification of service is incorrect because its motion was mailed to the wrong address and was thereafter returned to movant's attorney marked "addressee unknown."*

Since the judgment of this Court was entered on September 21, 1972, the motion was not made until at least nineteen days after entry of judgment and the earliest date which may be used as a basis to request the filing of a petition for rehearing similarly is October 10, 1972.

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* Federal Rule of Appellate Procedure 27(a) says a motion is "made" when it is filed *with* proof of service. Since the "proof" of service herein was defective, the earliest day the motion can be deemed to have been made must be October 10, 1972.

District 65 may not utilize Federal Rule of Appellate Procedure 26(c) to extend its time because the operative date from which the time to file a petition for rehearing is computed is the day of entry of the judgment, not "within a prescribed period after service of a paper upon" District 65. Most fundamental, when District 65 made the instant motion it was not a party—and only a party may invoke the protection of Rule 26(c).*

Were District 65 permitted to intervene, it would have only those rights coextensive with the NLRB's. It is plain from Rule 40 that if nineteen days after entry of judgment the NLRB sought to file a petition for rehearing, it would have been barred from so doing because of the limitation of time. Surely, District 65 can have no rights greater than those of the Board's.

To grant movant's application for leave to intervene for the purpose of filing a petition for rehearing consequently would be futile.

POINT III

District 65 intentionally waived any right to intervene.

The proposed petition for rehearing adds nothing to the arguments made to this Court either in the briefs of the parties or in oral argument in April, 1972. Thus, proposed intervenor sat by until it became dissatisfied with the Court's decision and now seeks a second bite of the

* Even if 26(c) applied to movant, its motion would still be untimely because the motion was made more than seventeen days after even the extended period permitted by 26(c).

apple and seeks to rehash litigation byond the stage where it properly must terminate.

The briefs of the Board and of Petitioner were available to District 65 months ago. Any matters which it feels should have been called to the Court's attention should have been done so at or before argument, and certainly before the decision and judgment. That District 65's position may have "coalesced" with the NLRB's is irrelevant. Instead, the question is whether District 65 deferred to the NLRB to present District 65's, as well as the oBard's, case. District 65, by choosing deliberately not to intervene, failed to establish sufficient interest to permit it to do so now, after decision. It has waived any claim to intervene.

Movant's citation of the unreported intervention order in *Taylor* v. *Johnson,* 322 F.2d 216 (6th Cir., 1963), cert. den. 376 U.S. 951 (1964) is misleading, and *Taylor* certainly did not involve "similar circumstances." That order, a copy of which is appended hereto, explicitly denied a motion by the union for leave to intervene. It permitted only limited intervention to others for the sole purpose of perfecting an appeal to the Supreme Court. Moreover, because there are no published reasons for the *Taylor* order, and because that decision is unreported, this Court is required to speculate over how many other unreported decisions exist *denying* post-decision motions to intervene. Nor does *International Union, etc., Local 13* v. *Eagle-Picher Mine and Smelting Co.,* 325 U.S. 335 (1945), support District 65's position. In *Eagle-Picher* the charging party intervened in a Court of Appeals enforcement proceeding before decision (119 F.2d 903) and continued its interven-

tion again (141 F.2d 843) in support of a later petition by the Board to vacate the earlier Court of Appeals enforcement order. Since the charging party had participated in the case at an early stage of the appellate level, the Supreme Court merely held that it had established an interest in the Court of Appeals decision sufficient to justify its participation as an intervenor in the Supreme Court appeal. 325 U.S. at 338-339. In the case at bar, District 65 seeks to intervene entirely after the fact and has failed to establish the existence of any interest comparable to the intervenor's in *Eagle-Picher*.

Decisions conferring a limited right to intervene for the purpose of perfecting an appeal to the Supreme Court are therefore entirely irrelevant to the present attempt by District 65 for leave to intervene, after a decision, to reopen the case, much less to reopen the case *en banc*.

WHEREFORE, Petitioner respectfully prays that the motion in all respects be denied.

Dated: New York, New York
October 18, 1972

Respectfully submitted,

Phillips, Nizer, Benjamin,
Krim & Ballon,
Attorneys for Petitioner-Employer
477 Madison Avenue
New York, New York 10022
Tel. (212) 758-6700

By: Robert Cammer

Order Annexed to Memorandum

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FRED H. JOHNSON, Trustee Under the Will of Clay M. Thomas, Deceased, d/b/a Atlas Linen and Industrial Supply,

Respondent.

[Filed November 29, 1963]

Before:

WEICK, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

This cause came on to be heard on the motion filed by Mollie S. Taylor, Mary J. Wagner, Inez L. Bostic, Juanita Donaldson, Grace Karnes, Phillip E. McBee, Floyd Hall, Minta Justice, Otis Kinney, David W. Hall, Dicie P. Newell, Victoria Branham, Mary B. Galbreath, Della M. Gleason, Beulah Kuli, Marie H. Holbrook, Albert T. Rucker, Betty E. Hall, Harold James Comer and Francis C. Burnard for leave to intervene as petitioners for the purpose of perfecting an appeal to the Supreme Court, and on the memorandums of the respondent and the Board in opposition

thereto, on consideration whereof, the Court finds said motion to intervene is well taken and is hereby granted. *International Union of Mine, Mill and Smelter Workers Local 13* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338.

The motion for leave to intervene filed by Region 34, District 50, United Mine Workers is hereby denied.

/s/ PAUL C. WEICK,
United States Circuit Judge

FILE COPY

FILED

MAR 5 1973

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1029

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,

Petitioner,

against

R & M KAUFMANN, a Division of Russ Togs, Inc., etc., *et al.*,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, R & M KAUFMANN, a Division of Russ Togs, Inc., TO PETITION FOR A WRIT OF CERTIORARI

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Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1972

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against

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, R & M KAUFMANN, a Division of Russ Togs, Inc., TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

Contrary to the Petition, the only order (not "opinion") properly before this Court for review is that denying Petitioner's post-judgment motion for leave to intervene and for leave to file a petition in the Court below for a rehearing. That order is reproduced in Appendix to Petition for Writ of Certiorari, at p. 8a.

Although the opinion below on the merits is not properly before this Court, it is set forth in the Petition, *id.* at pp. 1a-7a.

Jurisdiction

Petitioner's statement as to jurisdiction, Petition, p. 2, is incorrect.

Respondent first disputes that this Court has jurisdiction to review the October 27, 1972 order denying intervention because, for reasons of waiver and timeliness, petitioner is not a "party" under 28 U.S.C. 1254(1).

Respondent secondly argues *infra* that in any case this Court has no jurisdiction to review the September 21, 1972 judgment on the merits.

Counter-Statement of the Only Question Presented

When a union participates actively as a party in proceedings before the National Labor Relations Board, is thereafter provided with full, formal and timely notice of the Court of Appeals enforcement/review proceeding, and the briefs of the parties are made available to it, may the Union *after judgment* be granted intervention for the purpose of re-litigating the merits, despite its deliberate decision to waive its right to intervene before judgment in the review proceeding?

Statutes Involved

The statutes involved are set forth in the Petition, except that an additional pertinent statute of the United States is:

> 28 U.S.C. 2101(c). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.
> • • •

Counter-Statement of the Case

Petitioner was the petitioner in a protracted representation proceeding and was the charging party in an unfair labor practice refusal to bargain proceeding before the National Labor Relations Board, which resulted in the order to bargain reviewed by the Seventh Circuit.

Petitioner was given full, formal and timely notice of the Seventh Circuit enforcement/review proceeding.*

Approximately nine months elapsed between commencement of the enforcement/review proceeding and the date of argument. More than five months elapsed between argument below and the unanimous *per curiam* opinion and judgment granting the petition for review and denying enforcement. Petitioner knew that it had the right to intervene in that proceeding, but admits it decided not to seek timely intervention. Petition, p. 8; Appendix to Petition, p. 22a.

It was not until after the Court of Appeals denied enforcement of the Board's order and granted review, and even after the Board's time to seek a re-hearing had expired,** that petitioner, for the first time, moved for leave to intervene below and for rehearing of the merits.

After its motion was denied, the present Petition was filed. The Union has the temerity therein to seek review not merely of the denial of its motion to intervene, but also of the merits of the underlying opinion and judgment, even though petitioner was not, and still is not, a party to the enforcement/review proceeding.

---

* See Appendix to Brief, *infra*.

** See Appendix to Petition at pp. 47a-48a.

Why the Writ Should Not Be Granted

I

No question warranting review by this Court is presented by the denial of intervention, after judgment, in an NLRB Court of Appeals enforcement/review proceeding, to a labor organization which deliberately refrained from exercising its undisputed right to intervene until after the extensive review proceeding had been concluded.

It is not only fundamental fairness to permit an interested person timely to intervene in a proceeding affecting his rights, but such intervention serves the additional purpose of judicial economy by permitting the rights, views and interests of all those directly affected by the controversy to be resolved in one litigation instead of in a multiplicity of successive litigations. To this end, this Court decided *International Union, Local 283* v. *Scofield; UAW* v. *Fafnir Bearing Co.*, 382 U.S. 205 [*Scofield/Fafnir*], which held that a timely motion to intervene by a successful charging party in an NLRB case would be granted—but only in the court in which the review proceeding is pending. 382 U.S. at 207, 208.

Petitioner's approach turns this salutary doctrine on its head. The critical rationale of *Scofield/Fafnir* is that timely intervention is guaranteed in NLRB cases precisely to avoid multiple Court of Appeals proceedings. 382 U.S. at 212-213. If petitioner's argument were accepted, an interested person or party to a Board proceeding would be permitted to watch as a spectator during the process

of litigation which affects his interests, and in which he is entitled by right to intervene, and, only if disappointed by the outcome, then to step forward as a "new" participant to demand litigation of the issues once again.

Such a view of intervention has no support among the circuits or in any of the decisions of this Court. Petitioner has raised no controversy which must be resolved among the circuits. Petitioner's contention, on its face, presents no substantial question of federal law which merits the attention of this Court.*

Indeed, contrary to petitioner's invocation of *Fafnir*, the only relevant authority concerning post-judgment attempts to intervene supports respondent. Thus, in *Cushman Motor Delivery Co., etc., et al.* v. *Hon. F. Ryan Duffy, et al.*, October Term, 1963, No. 1023 Misc., this Court refused to review denial of a post-judgment motion after an NLRB review proceeding where the employer among other things sought intervention. 376 U.S. 948. The Board in *Cushman* opposed review by the Supreme Court in large part because the motion for leave to intervene was made in the Court of Appeals after judgment. Brief and Petition in *Cushman, supra*, No. 1023 Misc.**

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* Furthermore, even if petitioner's motion to intervene otherwise had colorable substance, the issue is not clearly presented by this case because petitioner's post-judgment motion for leave to intervene fourteen months after commencement of the review proceeding was untimely under the Federal Rule of Appellate Procedure 15(d) thirty-day requirement. See especially Appendix to Petition at pp. 46a-50a.

** *Cushman* sought review of the judgment in *Flack* v. *NLRB*, 327 F.2d 396 (7th Cir.). The employer and union there, unlike the instant case, were given only informal notice of the Court of Appeals proceeding. Significantly, the employer commenced a new, mandamus proceeding in this Court and argued in *Cushman* that the extraordinary writ was the only available remedy to it because it admitted that it had no statutory certiorari right under 28 U.S.C. 1254(1) since it sought review of the very denial of its application to become a party.

Petitioner is simply wrong when it claims it is being denied its right to intervene. The Court below did not deny the right. Petitioner waived the right.

II

Even if petitioner is assumed *arguendo* to be a "party" for the purpose of seeking review of the order denying intervention,* manifestly it has no standing and is not a "party" and therefore this Court has no jurisdiction with respect to review of the judgment on the merits. 28 U.S.C. 1254(1).

It is settled that "[t]he refusal of the court below to permit one to intervene as a party does not, however, entitle that person to review by the Supreme Court, either by certiorari or appeal, of anything but the denial of the motion to intervene." Stern & Gressman, "Supreme Court Practice" (4th Ed., 1969), p. 282, citing *Scofield/Fafnir*, 382 U.S. at 209; and *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519; *Cascade Natural Gas Corp.* v. *El Paso Gas Co.*, 386 U.S. 129.

Finally, the present Petition is filed far too late for review of the original September 21, 1972 judgment in any event. 28 U.S.C. 2101(c). Therefore, to grant the instant Petition would be futile: it would provide review of a judgment which has become non-reviewable.

* The ninety-one-day lapse between the October 27, 1972 "intervention" order and the January 26, 1973 filing of the instant Petition raises the question whether the entire Petition is untimely, in violation of 28 U.S.C. 2101(c).

III

To the extent the Petition seeks to attack the merits of the original judgment denying enforcement and granting the petition for review, two observations are apposite:

(A) Petitioner has no standing because it still is not a party to the proceeding below, and consequently may not petition for review on the merits. See argument, Point II.

(B) Even if petitioner had standing, review would not be justified. The judgment denying enforcement is based upon the Seventh Circuit's conclusion on its review of the record that the relationship between petitioner and NAWCAS, a disqualified association, is too close and too intertwined to meet the prophylactic requirement that District 65 must bargain for the benefit of its employees and not for the protection of NAWCAS; that, in short, the present record establishes a conflict of interest. Appendix to Petition, at pp. 1a-7a.

This Court has ofen held that it will not review the conclusions reached by the Court of Appeals upon the latter's review of the record in an unfair labor practice case merely on the chance that this Court may reach a different conclusion. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, at 502; *NLRB* v. *American National Insurance Co.*, 343 U.S. 395; *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404.

Conclusion

The petition for writ of certiorari should in all respects be denied.

Respectfully submitted,

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KRIM & BALLON
Of Counsel

APPENDIX

Petition for Review

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

R & M KAUFMANN, a Division of RUSS TOGS, INC.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

R & M KAUFMANN, a Division of RUSS TOGS, INC., hereby petitions the Court for review of the Order of the NATIONAL LABOR RELATIONS BOARD which finds petitioner in violation of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act and orders it to bargain collectively with District 65, Wholesale, Retail, Office and Processing Union; said Order being entered on July 9, 1971.

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

By s/ Jerome B. Kauff

A Member of the Firm
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U.S.C.A.-7th Cir.
FILED
July 13, 1971
Kenneth J. Carrick,
Clerk

Affidavit of Service by Mail

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[SAME TITLE]

State of New York)
County of New York) ss.:

JEROME B. KAUFF, being duly sworn deposes and says that he is the attorney for petitioner, R & M KAUFMANN, a Division of RUSS TOGS, INC., herein. That on the 13th day of July, 1971, he *served a Petition for review upon District 65, Wholesale, Retail, Office and Processing Union, charging party** before the National Labor Relations Board by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 477 Madison Avenue, in the County and State of New York, directed to said charging party at 13 Astor Place, New York, New York, that being the address within the State designated by it for that purpose or place where it then kept an office, between which places there then was and now is a regular communication by mail.

a/ Jerome B. Kauff

JEROME B. KAUFF

[Sworn to before a notary public]

* Emphasis added.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1029

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA, PETITIONER

v.

R & M KAUFMANN, A DIVISION OF RUSS TOGS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by failing to bargain with petitioner District 65, which had been certified by the Board as the representative of a unit of the Company's sales employees. The Board rejected the Company's contention that District 65 was not sufficiently independent of the National Association of Women's and Children's Apparel Salesman, Inc. ("NAWCAS") to insure good faith representation of the employees in the bargaining unit. (Pet. App. 9a-20a, 33a-41a.) The court of appeals ruled, contrary to the Board, that the "record is replete with proof of the close relationship between NAWCAS and District 65" (Pet. App. 6a), and declined to enforce the Board's order.

2. Although the Board believes that the court of appeals should have enforced its order, it did not seek further review because, in its view, essentially only an evidentiary issue was presented. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. However, petitioner District 65, the charging party before the Board, sought to intervene in the case in the court of appeals after judgment had been entered, for the purpose of filing a petition for rehearing (Pet. App. 21a-23a). The court of appeals denied the motion to intervene (Pet. App. 8a).

3. The threshold issue presented is whether the court of appeals properly denied the motion to intervene. For, if it did, petitioner is not a "party" and thus has no standing to seek certiorari. *Auto Workers* v. *Scofield,* 382 U.S. 205, 209; *Railroad Trainmen* v. *Baltimore & Ohio R. Co.,* 331 U.S. 519, 524.

Although a charging party before the Board has the right to intervene in enforcement or review proceedings in the courts of appeals (*Auto Workers* v. *Scofield, supra,* 382 U.S. at 217), Rule 15(d) of the Federal Rules of Appellate Procedure provides that "[a] motion for leave to intervene * * * shall be filed within 30 days of the date on which the petition for review is filed." The decision whether to allow intervention after that time is within the discretion of the court of appeals[1] in light of all the circumstances.

Since petitioner could have anticipated that the Board might not seek certiorari in the event of an adverse

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[1] See *Alleghany Corp.* v. *Kirby,* 344 F. 2d 571 (C.A. 2); *Kaplan* v. *Guardian Life Ins. Co.,* 231 F. Supp. 874, 976-877 (W.D. Mo.); 3B Moore's Fed. Prac. 24-524.

court of appeals decision, and since the grant of intervention after judgment would have required the court below to duplicate its decisional task, the court did not abuse its discretion in denying petitioner's belated motion to intervene.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1973.